BILL C-15: CRIMINAL LAW AMENDMENT ACT, 2001

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LEGISLATIVE HISTORY OF BILL C-15

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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-15: CRIMINAL LAW AMENDMENT ACT, 2001*

BACKGROUND

Bill C-15, An Act to amend the Criminal Code and to amend other Acts (the Criminal Law Amendment Act, 2001), was introduced in the House of Commons and given first reading on 14 March 2001. Bill C-15 reintroduces measures contained in Bill C-17 – "An Act to amend the Criminal Code (cruelty to animals, disarming a peace officer and other amendments) and the Firearms Act (technical amendments)" – and in Bill C-36 – "An Act to Amend the Criminal Code (Criminal Harassment, Home Invasions, Applications for Ministerial Review – Miscarriages of Justice, and Criminal Procedure) and to Amend Other Acts" – which were introduced in the previous Parliament but which died on the *Order Paper* at dissolution. Bill C-15 also proposes new *Criminal Code* provisions which seek to counter sexual exploitation of children involving the Internet as well as further amendments to the *Firearms Act*.

The highlights of the bill are:

- creating new offences and enforcement measures to deal with sexual exploitation of children, particularly in connection with the Internet;
- raising the maximum penalty for criminal harassment (i.e., "stalking") from five to ten years' imprisonment;
- making "home invasion" an aggravating factor in sentencing;
- creating an offence of disarming, or attempting to disarm, a peace officer;

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* Notice: For clarity of exposition, the legislative proposals set out in the Bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

- amending the provisions dealing with cruelty to animals, for example by providing a definition of "animal," creating a new part to the *Criminal Code* for these offences, and increasing the maximum penalties that are available;
- facilitating the greater use of technology in the electronic filing of documents and the "virtual" appearance of persons in court through audio-visual links;
- allowing for input from Crown prosecutors in private prosecutions;
- making preliminary inquiries optional and potentially more focused;
- requiring advance notice of the use of expert testimony by either side;
- clarification of the process of criminal conviction reviews by the Minister of Justice (*Criminal Code*, section 690), and extending the process to summary conviction cases;
- making a series of amendments to the *Firearms Act* and the firearms-related provisions of the *Criminal Code*; and
- bringing the military justice system further into line with the civilian system by providing for the fingerprinting of persons charged with or convicted of designated service offences under the *National Defence Act*.

DESCRIPTION AND ANALYSIS

A. Sexual Exploitation of Children

1. Child Sex Tourism: Removal of Procedural Condition for Prosecution

In 1997, Parliament amended the *Criminal Code* to extend criminal liability for certain sexual offences to acts committed abroad by Canadian nationals: section 7(4.1). Sections 7(4.2) and (4.3), which were also added at this time, made prosecutions under section 7(4.1) conditional upon the receipt of a request from the government of the country where the offence occurred and the consent of the Attorney General of Canada, except in the case of an offence of child prostitution contrary to section 212(4) of the Code.

Clause 3(2) of the bill amends sections 7(4.2) and (4.3) of the Code in order to eliminate this distinction and simply requires the consent of the Attorney General in all cases as a precondition of a prosecution under section 7(4.1).

2. Child Pornography and the Internet

Section 163.1 of the Code prohibits the production, distribution and possession of child pornography. Clauses 11(2) and (3) of the bill amend section 163.1 to ensure that these criminal prohibitions extend to analogous conduct in an Internet context.

Clause 11(2) adds language to section 163.1(3) of the Code, which prohibits various acts of distribution of child pornography, to cover such things as "transmission" and "making available" in order to ensure that the offence extends to distribution of child pornography in electronic form on the Internet by such means as e-mail and posting items to websites.

Clause 11(3) adds new sections 163.1(4.1) and (4.2) to deal with accessing child pornography. New section 163.1(4.1) makes accessing child pornography an offence punishable on summary conviction (maximum penalty: fine of up to $2,000 and/or imprisonment for up to six months) or, on an indictment, by imprisonment for up to five years. In contrast with the existing offence of possession which, in the context of the Internet, at least arguably requires that the accused download the material to a computer hard-drive, disk or printer, the new accessing offence would cover those who merely view the material through an Internet browser. New section 163.1(4.2) specifies, however, that the accessing of child pornography must be intentional if it is to be covered by section 163.1(4.1). In other words, the accused must know before viewing the material in question, or causing its transmission to himself or herself, that it contains child pornography.

Clause 86 amends the provisions of the Code dealing with "long-term offenders" (section 753.1) in order to add the child pornography offences of section 163.1, including the new accessing offence in section 163.1(4.1), to the list of offences for which a long-term offender order may be made. The long-term offender order is designed for offenders facing a sentence of at least two years for certain sexual offences where the court is satisfied that there is a substantial risk of reoffending. In such cases, a sentencing court may order a lengthy period (up to ten years) of post-release supervision in the community.

3. Luring of Children over the Internet

Clause 14 of the bill adds section 172.1 to the Code which would specifically make it an offence to communicate via a "computer system" with a person under a certain age, or

a person whom the accused believes to be under a certain age, for the purpose of facilitating the commission of certain sexual offences in relation to children or child abduction. Depending on the offence being facilitated, the requisite age or believed age of the victim varies among the following ages: 18, 16 and 14. As with other offences where the age or believed age of the victim or intended victim is an ingredient of the offence, section 172.1 provides that:

- the accused's belief in the victim's age may be inferred from a representation to the accused to that effect; and
- the accused is precluded from relying on the defence of mistake of fact as to the victim's age unless the accused took reasonable steps to ascertain the person's age.

Internet luring of children contrary to section 172.1 is punishable on summary conviction (maximum penalty: fine of up to $2,000 and/or imprisonment for up to six months) or, on an indictment, by imprisonment for up to five years.

Clause 86 amends the provisions of the Code dealing with "long-term offenders" (section 753.1) in order to add the new Internet child-luring offence in section 172.1 to the list of offences for which a long-term offender order may be made. The long-term offender order is designed for offenders facing a sentence of at least two years for various sexual offences where the court is satisfied that there is a substantial risk of reoffending. In such cases, a sentencing court may order a lengthy period (up to ten years) of post-release supervision in the community.

4. Court-Ordered Deletion of Child Pornography from Internet Sites

Clause 13 of the bill adds section 164.1 to the *Criminal Code* which would provide for the court-ordered deletion of material found to constitute child pornography from any computer system within the court's jurisdiction.

If, on the basis of a sworn information, a judge is satisfied that there are reasonable grounds to believe that such material is stored in or made available through a computer system within the court's jurisdiction, the judge could issue a warrant of seizure ordering the custodian of the computer system (e.g., the Internet Service Provider, or ISP) to:

- provide an electronic copy of the material to the court;
- remove the material from its system; and
- provide information on the identity and location of the person who posted the material on the system.

The court is then required to give notice to the person who posted the material and provide him/her with an opportunity to show cause why it should not be deleted. If this person cannot be identified or located, or if he or she resides outside of Canada, the judge can order the computer system custodian to post the notice at the site where the impugned material was posted. If the person who posted the material does not appear, the hearing may proceed and the court may determine the matter in the person's absence.

If it is satisfied on a balance of probabilities (i.e., the civil standard of proof) that the material in question is either child pornography or computer data that make child pornography available, the court may order the computer system custodian to delete the material. Otherwise, the court must order the return of the electronic copy of the material to the computer system custodian and terminate its order requiring the custodian to remove the material from its system. The court's decision in such a case may be appealed and the Code provisions governing appeals in indictable cases generally apply. A deletion order does not take effect until the expiration of the time for taking an appeal according to the Rules of Court for that province or territory.

5. Seizure and Forfeiture of Offensive Material and of Property Used in the Commission of Child Pornography Offences

Clause 12 of the bill amends section 164(4) of the Code to clarify that, for the purposes of forfeiture, the court need only be satisfied to the civil standard of proof (i.e., balance of probabilities) that the material in question is obscene or constitutes child pornography. The amended section 164(4) would also make a forfeiture order discretionary on the part of the court, rather than mandatory.

In new sections 164.2 and 164.3, clause 13 provides for the forfeiture of personal property used in the commission of a child pornography offence under section 163.1. Currently, forfeiture of such property is only available where the offence is committed as part of the activities of a criminal organization (see sections 490.1 through 490.9 of the Code).

The new provisions on forfeiture and relief from forfeiture proposed in clause 13 are similar to those found elsewhere in the *Criminal Code* and in other federal statutes. Forfeiture to the Crown, of things used in the commission of a child pornography offence, may be ordered on the application of Crown counsel by a court which, having convicted the owner of

the property of a child pornography offence under section 163.1, is satisfied on a balance of probabilities that the items in question were used in the commission of the offence. Forfeiture of such property can also occur where the owner is not convicted of such an offence, but where he or she acquired it from such a person in circumstances which suggest that ownership was transferred for the purpose of avoiding forfeiture. Innocent third parties would have 30 days from the date of the forfeiture order to seek an order from the court declaring that their interest in the property is unaffected by the forfeiture.

Clauses 73 and 79 make consequential amendments providing for the application of Code provisions governing appeals of orders.

6. Preventative Orders

The *Criminal Code* permits courts to make orders restricting the otherwise lawful conduct of individuals in various circumstances, either as part of punishment or in order to prevent the future commission of offences, or both. Two such provisions are specifically aimed at protecting children from sexual predators:

- Section 161 permits courts sentencing persons for certain sexual offences against children under age 14 to prohibit them from various activities which would likely bring them into contact with such children for specified periods up to and including life.
- Section 810.1 permits a court to order a person to enter into a recognizance binding him or her to abstain from various activities likely to bring them into contact with persons under the age of 14. Unlike a section 161 order, an order under section 810.1 does not require a conviction for an offence or even the laying of a charge – it can be obtained by anyone who can establish a reasonable fear that the person in question will commit one or more of the enumerated sexual offences against a person under the age of 14. However, a section 810.1 order can only be for a maximum period of 12 months.

Clauses 10 and 91 of the bill amend sections 161 and 810.1, respectively, in order to:

- add the child pornography offences in section 163.1 and the new Internet child-luring offence proposed in clause 14 (new section 172.1) to the list of offences – or feared offences, in the case of section 810.1 – in response to which such orders may be made; and

- add to the list of activities which may be proscribed by such orders the use of a computer system (i.e., the Internet) for the purpose of communicating with a person under the age of 14.

B. Cruelty to Animals

A comprehensive review of the current provisions in the *Criminal Code* relating to cruelty to animals is probably long overdue.(1) In response to the dissatisfaction with the provisions expressed by many groups and individuals, the Department of Justice conducted a review in 1998. A consultation paper entitled *Crimes Against Animals* was distributed to allow groups and individuals to suggest the modifications that would be required to deal effectively with cruelty to animals. One of the reasons for the department's action was "mounting scientific evidence of a link between animal abuse and domestic violence and violence against people generally."(2) The government's initiative drew hundreds of responses. The proposed changes to the *Criminal Code* are the result of this consultation process and are said to signify "the seriousness of these acts that are often warning signs of subsequent violent behaviour aimed at people."(3) Although the proposed changes are similar to those found in Bill C-17, there have been some modifications.

Clause 15 creates a new Part V.1 of the *Criminal Code* entitled Cruelty to Animals.(4) Thus, the bill proposes to move the current provisions relating to cruelty to animals from Part XI, entitled *Wilful and Forbidden Acts in Respect of Certain Property,* to the newly created Part V.1. This modification is more than merely cosmetic because it would change the way the *Criminal Code* regards animals in that the cruelty to animals offences would no longer be treated, in large part, as property crimes and animals would be regarded essentially as beings that feel pain.(5) Protecting animals, even in part, by virtue of their status as property has been

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(1) *Criminal Code*, R.S.C. 1985 c. C-46, ss. 444 to 447. Despite a series of amendments throughout the years, the offences relating to cruelty to animals have not changed significantly since 1892.

(2) Covering letter to *Crimes Against Animals, A Consultation Paper,* Department of Justice, September 1998.

(3) Department of Justice, News Release, "Justice Minister Introduces Measures to Better Protect Canadians and Safeguard Children from Cyber Criminals," 14 March 2001, p. 2.

(4) Bill C-17 would have placed the cruelty to animal provisions in Part V of the *Criminal Code* and would have amended the heading of Part V by adding the words "cruelty to animals."

(5) Not all of the current provisions have as a purpose the protection of proprietary interests. For example, section 446(1)(a) provides protection to all animals, even though there is no property relationship with a person.

criticized on the grounds this "suggests that the law is less concerned with protecting animals as beings capable of suffering than with the protection of human proprietary interests, and does not satisfactorily convey a moral obligation to avoid inflicting unnecessary harm."[6] In addition, it is argued that this approach "fails to convey the seriousness of the crimes to the various players in the criminal justice system, including prosecutors and judges."[7]

Clause 15 consolidates the current *Criminal Code* provisions relating to cruelty to animals and adds certain new elements.

Proposed section 182.1 defines "animal" for the purposes of newly created Part V.1 as a vertebrate, other than a human being, and any other animal that has the capacity to feel pain. This is another example of a proposed change in how the *Criminal Code* views animals, so that they would be seen less as property and more as beings with the capacity to feel pain. In addition, all animals that satisfied the definition would be protected. In some cases, the current provisions limit their application to certain types of animals (for example, cattle and domesticated animals).

Proposed section 182.2(1) sets out the activities in relation to animals that would attract criminal liability if committed wilfully or recklessly:

- causing "unnecessary pain, suffering or injury to an animal" or, in the case of an owner, permitting this to be done (section 182.2(1)(a));[8]
- killing an animal "brutally or viciously, regardless of whether the animal dies immediately" or, in the case of an owner, permitting this to be done (section 182.2(1)(b));
- killing an animal without lawful excuse (section 182.2(1)(c));[9]

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(6) Department of Justice, *Crimes Against Animals, A Consultation Paper*, "Part Three: Reconsidering the Criminal Law," September 1998.

(7) *Ibid.*

(8) The current provision is similar and also requires that the person commit the act "wilfully." See *Criminal Code* s. 446(1)(a). Section 446(3) states that "evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering, damage or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering, damage or injury was caused or was permitted to be caused wilfully..." In addition, section 429(1) states that everyone "who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed...wilfully to have caused the occurrence of the event."

(9) Currently, it is an offence to wilfully kill, maim, wound or injure cattle or to wilfully and without lawful excuse kill, maim, wound or injure domestic animals; see *Criminal Code* sections 444 and 445. Section 429(2) states that no one "shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right." The proposed provision mentions excuse but does not mention justification or with colour of right.

- poisoning an animal, placing poison so that it may be easily consumed by an animal or administering an injurious drug or substance to an animal or, in the case of an owner, permitting this to be done. The offence would be applicable only if the person acted without lawful excuse (section 182.2(1)(d));[10]
- activities relating to the fighting or baiting of animals, including training an animal to fight another animal (section 182.2(1)(e));[11]
- building or keeping a cockpit or other fighting arena on premises that the person owned or occupied (section 182.2(1)(f));[12]
- activities relating to the liberation of captive animals for the purpose of being shot at the moment they are liberated (section 182.2(1)(g));[13] and
- for an owner, occupier or person in charge of any premises to permit the premises to be used for the activities referred to in paragraphs (e) (fighting or baiting) or (g) (liberating a captive animal to be shot) (section 182.2(1)(h)).[14]

New section 182.2(2) sets out the penalties for the offences listed above. These offences are hybrid offences with a maximum punishment of five years' imprisonment when the Crown proceeds by indictment or a maximum 18 months' imprisonment where the Crown proceeds by way of summary conviction.

New section 182.3 sets out the following series of offences relating to the failure to provide adequate care:

- negligently causing an animal unnecessary pain, suffering or injury (section 182.3(1)(a));

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(10) The current provisions are similar and apply when the person does these acts wilfully. See *Criminal Code* sections 444(a) and (b) (cattle), 445(a) and (b) (other animals – domesticated) and 446(e) (domestic animals). The proposed provision would apply to all animals and would not be limited to cattle and domestic animals as is now the case. In addition, section 429(1) states that everyone "who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed…wilfully to have caused the occurrence of the event."

(11) This is similar to the current provision. See *Criminal Code* section 446(1)(d), which states "encourages, aids or assists at the fighting or baiting of animals or birds."

(12) This is similar to the current provision but adds the terms "any other arena for the fighting of animals." See *Criminal Code* section 447(1).

(13) This is similar to the current provision but is expanded to cover all animals and not only captive birds. See *Criminal Code* section 446(1)(f).

(14) This is similar to the current provision but the current provision is limited to the activity referred to in paragraph (g). See *Criminal Code* section 446(1)(g).

- abandoning an animal or failing to provide suitable and adequate food, water, air, shelter and care for the animal if they are the owner or the person having custody or control of the animal (section 182.3(1)(b));[15] and
- negligently injuring an animal while it is being conveyed (section 182.3(1)(c)).[16]

New section 182.3(3) sets out the penalties for the offences set out in section 182.3(1). Once again these are hybrid offences with a maximum two years' imprisonment when the Crown proceeds by indictment. When the Crown proceeds by way of summary conviction, the individual would be liable to six months' imprisonment and/or a fine of not more than $2,000.[17]

New section 182.3(2) defines the term "negligently" for the purposes of sections 182.3(1)(a) and (c) as meaning departing markedly from the standard of care that a reasonable person would use.

Two aspects of the new provisions require discussion: the mental element of the offence and the defences available to the accused. With respect to the mental element, the current provisions often make reference to the requirement that the act be done "wilfully." This indicates that the highest standard *mens rea* is required for these offences. However, section 429(1), which applies to the cruelty to animals offences, states that everyone "who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed...wilfully to have caused the occurrence of the event." Thus, this provision qualifies the term "wilfully" to require only that the accused have knowledge that the act or omission will probably cause the occurrence of the event and to show recklessness as to whether it does so. Although Bill C-17 did not specify the required mental element for the cruelty to animal offences, new Bill C-15 provides that with respect to the offences listed in section 182.2, they must be committed wilfully or recklessly.

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(15) This is similar to the current provision which is limited to domesticated animals or birds or an animal or bird that is in captivity. See *Criminal Code* section 446(1)(c).

(16) This is similar to the current offence which applied when done "by wilful neglect." See *Criminal Code* section 446(1)(b). Section 446(3) states that "evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering, damage or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering, damage or injury was caused or was permitted to be caused ...by wilful neglect..."

(17) These penalties are prescribed by *Criminal Code* section 787.

Therefore, this is similar to what is currently provided. In addition, with respect to the offences listed in section 182.3, the term "negligently" is now defined.

With respect to defences, the current provisions state that no person shall be convicted of an offence "where he proves that he acted with legal justification or excuse and with colour of right."[18] The new provisions, in certain cases, provide that it would be an offence if the person acted "without lawful excuse."[19] The colour of right defence[20] generally applies to property crimes; thus, its exclusion from the proposed provisions is not surprising because these crimes are instead to be viewed in future as crimes against animals. In addition, the defence of mistake of fact would still be available in the appropriate circumstances. The purpose of excluding justification appears less clear. One could argue that the distinction between justification and excuse is only useful as an interpretive tool to determine the scope of the defence and that, therefore, the term "excuse" in the proposed provisions would apply to both a lawful excuse and a lawful justification. There does not appear to be a valid reason, however, why the provisions do not make reference to the expression "lawful justification or excuse."

In addition to any other sentence set out above, a court is able, as under the current provision, to make an order prohibiting the accused from owning an animal or having custody or control of an animal. A new feature also allows the court to prohibit the accused from residing in the same premises as an animal. The maximum length of the prohibition is also changed from its current maximum of two years to allow the court to make the prohibition for any period it felt appropriate and, in the case of second and subsequent offences, for a minimum of five years.[21]

New section 182.4(1)(b) adds a new feature to the provisions dealing with cruelty to animals by authorizing a court to order, on application by the Attorney General or on its own motion, that the accused pay reasonable costs incurred to take care of the animal. Payment could be made to any individual or organization that cared for the animal and would include such costs as veterinarian bills and shelter costs if these were readily ascertainable.

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(18) *Criminal Code* section 429(2).

(19) See proposed section 182.2 (1)(c) and (d).

(20) This defence applies when the accused can show an honest belief in a state of facts which, if they existed, would constitute a legal justification or excuse.

(21) See section 182.4(1)(a) of the bill and *Criminal Code* section 446(5).

Section 182.4(2) provides that a person who contravenes a prohibition order made by the court under section 182.4(1)(a) is guilty of an offence punishable on summary conviction and be liable to six months' imprisonment and/or a fine of not more than $2,000.(22)

One of the purposes of this bill is to increase the penalties relating to cruelty to animals and to provide a broader range of criminal sanctions. Under the current provisions, the offences are generally summary conviction offences.(23) This means that accused are liable to a maximum of six months' imprisonment and/or a fine of not more than $2,000.(24) Under the proposed legislation, the maximum length of imprisonment is increased to five years and there is no set limit for fines for the more serious offences.(25) With the creation of hybrid offences, the option of proceeding by way of summary conviction would still be available to the Crown for less serious offences but, in more serious cases, the prosecutor would have the option of proceeding by indictment, thus allowing for increased penalties. It is hoped that this would deter people from abusing animals and generally lead to crimes against animals being treated more seriously.

New section 182.4(3) makes general provisions relating to restitution orders applicable to orders made under section 182.4(1)(b).

Clause 18 of the bill makes a technical amendment to section 264.1(1)(c) of the *Criminal Code* by deleting the reference to "or bird."

Clause 24 repeals the current provisions dealing with cruelty to animals.

C. Criminal Harassment

Clause 17 of the bill raises the maximum sentence for the offence of criminal harassment from five years' imprisonment to ten years. Criminal harassment refers to such things as repeatedly following, watching or communicating with someone in a manner which reasonably causes that person to fear for their own safety or the safety of someone known to them. It was first made a distinct criminal offence in 1993 (S.C. 1993, c. 45, s. 2).

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(22) These penalties are prescribed by *Criminal Code* section 787.

(23) An exception being *Criminal Code* section 444, dealing with injuring and endangering cattle.

(24) See *Criminal Code* section 787.

(25) There would still be a maximum fine of $2,000 when section 787 of the *Criminal Code* applied.

D. Disarming a Peace Officer

Clause 19 of the bill creates a new offence of disarming a peace officer. This offence is essentially the same as the one in Bill C-17 and is intended to recognize "the grave risk that police officers face in the line of duty."[26] Proposed section 270.1(1) makes it an offence to take or attempt to take a weapon in the possession of a peace officer without his or her consent when the peace officer was engaged in the execution of his or her duty.

New section 270.1(2) defines "weapon" for the purposes of subsection (1) as "any thing that is designed to be used to cause injury or death to, or to temporarily incapacitate, a person." This would include not only firearms but also pepper spray and other items designed to be used to cause injury or death to, or to temporarily incapacitate, a person.

New section 270.1(3) sets out the penalty for this hybrid offence, which would have a maximum penalty of five years' imprisonment when the Crown proceeded by indictment or a maximum of 18 months' imprisonment where the Crown proceeded by way of summary conviction.

The proposed offence of disarming or attempting to disarm a police officer is the result of a process initiated by the Canadian Police Association. A resolution from their 1999 annual general meeting in Regina reads as follows:

WHEREAS	The disarming of police officers of firearms and the interference by offenders with the equipment issued to peace officers is a matter of serious concern which is worthy of note by a separate and distinct recorded criminal offence.
BE IT RESOLVED THAT	The *Criminal Code of Canada* is amended so as to create the indictable offence of disarming a police officer or interfering with equipment issued to a peace officer and that section 553 of the *Criminal Code of Canada* be amended to include this offence in those offences over which the provincial court has absolute jurisdiction.

(26) Department of Justice, "Backgrounder, Highlights of the Omnibus Bill," March 2001, p. 4.

Their suggested offence, similar but not identical to what is proposed in Bill C-15, states:

ASSAULTING A PEACE OFFICER

270.1 (1) Everyone commits an offence who,
(a) disarms or attempts to disarm a peace officer in the execution of his duty
(b) interferes with equipment issued to a peace officer.
270 (3) Everyone who commits an offence under section 270.1 is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

E. Sexual Exploitation of Person with Disability

Clauses 20, 21, 22 and 29 add the offence in section 153.1 of the *Criminal Code* (sexual exploitation of person with disability) to the list of other sexual offences for which there are special evidentiary rules. These amendments were also found in Bill C-17. Thus, a person with a disability who is the victim of sexual exploitation receives the same evidentiary protection as is afforded to other victims of sexual offences. The following are the affected provisions of the *Criminal Code*:

- Section 274 provides that in the case of the listed offences, corroboration is not required for a conviction and the judge is not to instruct the jury that it would be unsafe to find the accused guilty in the absence of such corroboration.
- Section 275 abrogates the rules relating to evidence of recent complaint with respect to the listed offences.
- Section 276 provides that, in the case of the listed offences, evidence that the complainant has engaged in sexual activity is not admissible to support an inference that the complainant is likely to have consented to the sexual activity or is less worthy of belief. The section also sets out the test that must be satisfied before evidence that the complainant has engaged in sexual activity can be adduced by or on behalf of the accused.
- Section 277 provides that evidence of sexual reputation is not admissible for the purpose of challenging or supporting the credibility of the complainant in the case of the listed offences.
- Section 486(2.1) provides that a court may, in certain circumstances, order a complainant or witness under the age of 18 years to testify outside the courtroom or behind a screen or other device that would prevent the complainant or witness from seeing the accused.

F. Home Invasions

Clause 23 of the bill is intended to make "home invasion" an aggravating factor in sentencing for certain offences, rather than a distinct offence. A court sentencing a person for unlawful confinement, robbery, extortion, or break and enter, would have to consider it an aggravating circumstance that the offence was committed in an occupied dwelling where the offender was either aware that it was occupied or was reckless in this regard, and where he or she used violence or threats of violence against a person or property. In other words, the presence of these factors would militate in favour of a harsher sentence.

G. Criminal Procedure

1. Remote Appearances and Electronic Filing of Documents

a. Overview

A key thrust of the bill is to reduce inefficiencies in the criminal justice system by providing for the use and filing of electronic documents with courts and by eliminating unnecessary court appearances by accused persons, particularly those in custody.

As a general matter, clause 2 of the bill ensures the legality and immediate effectiveness of judicial acts from the moment they are done, whether or not they are reduced to writing. This provision ensures the validity of judicial acts made in a number of circumstances where hard-copy documentary proof of the act is not immediately generated. Such situations could include judicial decisions in the form of orders or warrants which may be issued electronically or orally by telephone or some other form of audio or audio-visual communications link.

b. Alternatives to physical appearance of accused in proceedings

Clause 37 permits an accused to make an election or re-election as to mode of trial through a documentary submission, without personally appearing in court.

Clause 59(2) permits an accused to enter his or her plea to a charge via closed-circuit television or some other means which allow the accused and the court to engage in simultaneous visual and oral communication from a remote location. Such a remote appearance has to be ordered by the court and agreed to by the accused.

Clauses 70 and 71 permit an accused to appear through counsel designated by the accused during any proceedings under the Code, except: where oral evidence is being taken; during jury selection; or during the hearing of an application for a writ of *habeas corpus* (i.e., where the accused is challenging the validity of his or her detention).[27] However, the court retains the discretion to order the accused's presence during any part of the proceedings, and the accused has to be present to enter a plea of guilty and for sentencing, unless the court ordered otherwise.

Clause 71 also enables the designated defence counsel or the prosecutor to appear before the court by any technological means satisfactory to the court which permits the court and counsel to communicate simultaneously.

Clauses 77 and 78 provide for the remote appearance of accused persons at appeal proceedings in indictable cases. At such proceedings involving the receiving of evidence, clause 77 permits the court of appeal to order that any party could appear by any technological means satisfactory to the court that permitted the court and the parties to communicate simultaneously. Similar provision could be made at the actual hearing of an appeal for an accused who was in custody and was entitled to be present. At an application for leave to appeal or at other proceedings which are preliminary or incidental to an appeal, such an accused may appear by means of any suitable telecommunications device, including telephone.

Clause 94 (new section 848) provides that, in any proceedings involving an incarcerated accused who did not have access to legal advice during proceedings, before permitting such an accused to appear by means of audio-visual link, the court would have to be satisfied that the accused could understand the proceedings and that any decisions made by the accused during the proceedings would be voluntary.

Clause 28 addresses potential legal problems of a technical nature which may arise from the use of alternatives to physical appearance of accused persons in certain situations. In order for a court to deal with a criminal charge, it must have jurisdiction over the offence and over the accused. Historically, in Anglo-Canadian criminal procedure, a court's jurisdiction over an accused could be lost where the accused was physically absent from the proceedings. Currently, section 485(1.1) of the Code provides that jurisdiction over an accused is not lost by the failure of the accused to appear personally in certain circumstances. Clause 28 expands the

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(27) See also clause 87 which would make it clear that a person who was the subject of a writ of *habeas corpus* would have to appear personally in court, notwithstanding any other provision of the Code.

scope of this curative provision to cover additional situations where an accused's physical absence from the courtroom is authorized and the accused is represented by counsel. These situations would include:

- remote appearance at a bail hearing;
- remote appearance or authorized absence at a preliminary inquiry;
- remote appearance or appearance through counsel at trial;
- authorized absence from trial; and
- remote appearance at appeal proceedings.

c. Electronic documents

Clause 94 (new sections 841 to 847) of the bill facilitates the use of electronic documents in the criminal court process. The proposed new provisions deem *Criminal Code* references to documentary and document-filing requirements to include electronic documents and to electronic filing of documents, provided that such use and filing of electronic documents was in accordance with applicable statutory provisions or rules of court.

2. Conditions for Accepting Guilty Pleas

Clause 59(1) requires courts to satisfy themselves as to the following before accepting guilty pleas:

- that the accused's plea is voluntary; and
- that the accused understands:
    a. that the plea is an admission of guilt of the essential elements of the offence,
    b. the nature and consequences of the plea, and
    c. that the court is not bound by any agreement between the accused and the prosecutor (i.e., as to sentencing).

However, a court's failure to fully inquire into these matters would not invalidate such a plea.

3. Case Management

Clause 27 of the bill provides for the application of case management to criminal cases. Case management refers to a system of managing litigation cases through the application of strict timetables for the hearing of cases, depending on the nature and complexity of a case.

Such systems currently apply to civil cases in various jurisdictions. Clause 27 provides for the promulgation of court rules dealing with case management for criminal cases in the various provinces and territories.

4. Private Prosecutions

Most criminal prosecutions in Canada are conducted by or on behalf of the provincial or federal Attorney General's office. However, prosecutions can also be launched and conducted by or on behalf of private individuals. Although peace officers and Crown attorneys have special responsibilities and powers in the criminal justice system, the Crown does not have a monopoly on enforcing the law (although for some offences, the consent of either the provincial or federal Attorney General is required for a prosecution). Section 504 of the *Criminal Code* states that "any one" who has reasonable grounds to do so may lay an information before a justice of the peace alleging the commission of a criminal offence by another person. However, the Attorney General has the power to intervene in any such prosecution and may direct a stay of proceedings with the option of recommencing the case as a public prosecution (see *Criminal Code* sections 579 and 579.1).

Clauses 30 and 31 of the bill make some changes to the process for initiating and conducting private prosecutions, which is currently the same as for public prosecutions. First, a privately laid information has to be referred to a provincial court judge or a specially designated justice of the peace. Second, the provincial or federal Attorney General has to be given notice and an opportunity to be heard before the judge or designated justice of the peace can accept the information and issue a summons or arrest warrant. Finally, if the judge or designated justice of the peace declined to act on an information, the accuser, in order to pursue the matter, has to challenge the legality of that decision in a higher court or offer new evidence in support of the allegation. The accuser, or any other potential complainant in the matter, is precluded from simply bringing an information before a different judge or designated justice with the same evidence.

Clause 57 gives the Attorney General the option of intervening in a private prosecution – to the extent of being entitled to call witnesses, examine and cross-examine witnesses, present evidence, and make submissions – but without being deemed to have taken over the prosecution.

5. Preliminary Inquiries

a. Introduction

Preliminary inquiries are pre-trial hearings at which the prosecution must show that there is evidence to justify putting the accused on trial. Preliminary inquiries are only conducted in cases where the prosecution is proceeding by indictment.

As a way of reducing the time it takes to bring criminal cases to trial, and as a way of minimizing the extent to which complainants (particularly those in sexual assault cases) are subject to examination and cross-examination, federal and provincial governments have considered ways to reduce the number and duration of preliminary inquiries, including abolishing them altogether. However, it appears for the time being that the federal government prefers to narrow the scope of preliminary inquiries and reduce their number. The proposals contained in Bill C-15 are part of this approach. Other elements of this legislative strategy include increasing the maximum punishment for offences prosecuted summarily, and the reclassification of a large number of indictable offences as hybrid offences (where the Crown has the option of proceeding summarily and thus precluding a preliminary inquiry). However, these are not addressed in the bill.

b. Preliminary inquiries to be optional and could be limited by agreement

Clauses 34 through 36 make the holding of a preliminary inquiry in criminal cases dependent on an express request by the defence or the prosecution. A number of other provisions of the bill are largely incidental to this proposed change, including clauses 43 through 56, 69, 147 and 148.

Where preliminary inquiries were requested, clauses 37, 38(1) and 40 permit their scope to be limited in accordance with agreements between the defence and the prosecution. However, this narrowing of preliminary inquiries appears to be optional. Although the party which requested an inquiry (which would almost always be the defence) is required to identify the issues on which it wished evidence to be given, and the witnesses that it would like to hear, nothing in the bill forces the requesting party to do so in a manner which actually limits the scope of the inquiry from what it would otherwise be. However, in order to encourage such agreement, a pre-inquiry hearing before the preliminary inquiry judge can be held, on the application of either side or on the judge's own motion.

c. Conduct of preliminary inquiries

Clause 38(2) gives the preliminary inquiry judge the authority to permit the accused to be absent from all or any part of the inquiry on the accused's request. Clause 38(3) requires the preliminary inquiry judge to order the immediate cessation of any part of the examination or cross-examination of a witness that the judge considered to be abusive, excessively repetitive, or otherwise inappropriate.

Clause 39 permits a preliminary inquiry judge to receive otherwise inadmissible evidence which the judge considered to be credible or trustworthy, including a recorded statement of a witness, provided that the party offering the evidence gave reasonable notice to the other parties or the judge ordered otherwise. In such a case, however, a party is able to apply to the judge to have the source of such evidence appear for examination or cross-examination. Pursuant to clause 82, evidence admitted under clause 39 (except, presumably, where cross-examination was allowed) cannot be admitted into evidence at trial under section 715 which, in certain circumstances, allows for the admission at trial of evidence taken at the preliminary inquiry (e.g., where a witness refuses to be sworn or to give evidence, or becomes unavailable to testify by reason of death, insanity, absence from Canada, etc.).

6. Jury Selection

Where the presiding judge considered it advisable, clauses 62 and 67 permit the calling of two alternate jurors to be available until the commencement of trial. Once the trial itself was about to begin, the alternate jurors would either be excused from the proceedings or substituted for jurors who were no longer available to serve on the jury.

Clause 61 permits a different judge to preside over a trial from the one who presided over the jury selection process.

7. Notice of Expert Testimony

Clause 72 of the bill requires parties to give advance notice of any expert testimony being offered at trial. This provision is essentially aimed at the defence, because the prosecution is already required by the *Canadian Charter of Rights and Freedoms* to disclose its

case and generally any information which might reasonably be useful to the accused in his or her defence.[28]

Notice of expert testimony has to be given at least 30 days before the beginning of trial or within such other period fixed by the court. The notice has to include the name of the proposed expert witness, a description of the witness' area of expertise, and a statement of the witness' qualifications. In addition, a copy of any report prepared by the witness or, if no report has been prepared, a summary of the opinion to be given by the witness has to be provided in advance to the other side. Certain restrictions apply to the use of information disclosed pursuant to this provision: such information cannot be used in other proceedings, unless a court so ordered; and, absent the accused's consent, the prosecution is precluded from producing into evidence a proposed expert witness' report or opinion summary where the witness did not testify.

8. Restriction on Use of Agents

Clause 89 restricts the ability of non-lawyers (i.e., agents) to represent accused persons in summary conviction proceedings. In such cases, where an accused would be liable on conviction to a possible sentence of imprisonment for more than six months, an agent could act for the accused only where the accused was a corporation or where the agent was so authorized under a program approved by the province's lieutenant governor in council. Agents are already precluded from representing accused persons in indictable proceedings.[29]

9. Peace Bonds

Clauses 90(1), 90(2), 91(1), 91(2), 92(1) and 92(2) make technical amendments to the *Criminal Code* to provide that certain provisions refer to "a provincial court judge" rather than "the provincial court judge." This relates to informations laid before provincial court judges with respect to persons who fear that another person will commit a criminal organization offence,[30] a listed sexual offence,[31] or a serious personal injury offence.[32] As a result of the

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(28) *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1; and *R.* v. *Dixon*, [1998] 1 S.C.R. 244, 122 C.C.C. (3d) 1.

(29) Although sections 800(2) and 802(2) of the Code, dealing with summary conviction proceedings, provide that an accused may appear and examine and cross-examine witnesses personally, by counsel, or by agent, section 650(3), dealing with indictable proceedings, provides that an accused is entitled to make full answer and defence to the prosecution's case either personally or by counsel (i.e., no reference to agents).

(30) *Criminal Code* section 810.01.

(31) *Ibid.*, section 810.1.

(32) *Ibid.*, section 810.2.

amendments, a provincial court judge who received such informations could cause the parties to appear before a different provincial court judge. In addition, "a provincial court judge" (rather than "*the* provincial court judge" who had set them) could vary the conditions of a recognizance relating to these provisions.

H. Miscarriages of Justice

1. Overview

Clause 81 of the bill adds a new Part XXI.1 (new sections 696.1 to 696.6) to the *Criminal Code*, entitled "Applications for Ministerial Review – Miscarriages of Justice." The new provisions replace section 690 of the Code which deals with applications to the federal Minister of Justice regarding alleged wrongful convictions. Under this section, if the Minister of Justice chooses to intervene in a case, he or she may take the following steps:

- direct a new trial or appeal of the case; and/or
- refer any question concerning the application to the appropriate court of appeal for its decision.

2. Applications for Ministerial Review Under Section 690

It is estimated that the Minister of Justice receives about 50 to 70 applications for ministerial review each year.(33) Generally, the Department of Justice requests the following material in support of an application: a description of the reasons behind the claim of a miscarriage of justice, and any new information to support the claim; the trial transcripts; a copy of all court judgements in the case; and the factums filed on appeal.(34) Once these materials are provided, Justice Department counsel conduct a preliminary assessment of the file to determine whether there is an "air of reality" to the applicant's claims, based on new and significant information that was not available at trial.(35) If this threshold is met, the applicant's claims will be investigated and then a recommendation will be made to the Minister.(36)

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(33) Department of Justice, "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code" Consultation Paper, Ottawa, October 1998.

(34) *Ibid.*

(35) *Ibid.*

(36) *Ibid.*

Prior to 1994, the Department of Justice took a more or less *ad hoc* approach to section 690 applications. There was no set procedure or designated personnel to deal with them. Applications were assigned to counsel within the Department on an *ad hoc* basis as an extra responsibility. As a result, the process became the subject of some criticism on the following grounds:

- applicants did not know what threshold they had to meet to be successful, or what information went into the final recommendation to the Minister;
- the amount of time taken by the Department to consider the applications;[37] and
- counsel assigned to the applications tended to have a prosecutorial bias.[38]

3. Recent Administrative Changes to the Section 690 Application Process

In 1994, the Department of Justice instituted a number of measures to address complaints about the section 690 application process.

Additional lawyers were hired, and the Criminal Conviction Review Group (CCRG) was formed within the Department to deal exclusively with section 690 reviews.[39] Also, to provide further independence from the Department's prosecution function, the CCRG was set up in the Policy Sector of the Department.[40] The Department also began to make greater use of outside counsel,[41] which is particularly important in those cases which were prosecuted by the Department itself (i.e., all criminal prosecutions in the three territories and all non-*Criminal Code* federal offence prosecutions throughout Canada).

The Department published a handbook, available on the Department's website, which outlines the documentary requirements, guidelines and process for a section 690 review.[42]

Finally, the CCRG adopted the practice of disclosing to the applicant the investigative summary, which indicates all the information gathered during the review which

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(37) See, for example, Carl Karp and Cecil Rosner, *When Justice Fails, The David Milgaard Story*, Toronto: McClelland & Stewart, 1991, chapters 17-22.

(38) *Ibid.*, chapter 18.

(39) "Addressing Miscarriages of Justice," *supra*, note 33.

(40) *Ibid.*

(41) *Ibid.*

(42) *Ibid.*

will be disclosed to the Minister, before the Minister makes a final decision.[43] The applicant then has the opportunity to comment on the investigative summary and make final submissions to the Minister.[44]

4. Legislative Changes Proposed in Bill C-15 (Clause 81)

Clause 81 preserves the basic elements of the current system for ministerial review provided for in section 690. Ministerial review of convictions continues to be an extraordinary and discretionary remedy available only after the ordinary appeal and review mechanisms have been exhausted. In dealing with such applications, the Minister continues to have the same options available, i.e.:

- reject the application;
- order a new trial;
- refer the case to the court of appeal; and/or
- refer any question concerning the application to the court of appeal.

However, clause 81 makes some changes aimed at enhancing the effectiveness and transparency of the process.

Clause 81 extends ministerial review applications based on an alleged miscarriage of justice to all federal offences. Currently, section 690 applies only to offences prosecuted by indictment.

Regulations to be made by the Governor in Council prescribe the form and content of applications for ministerial review, the necessary accompanying documentation, and the review process generally.

The Minister is:

- given the powers of a commissioner under the *Inquiries Act*, i.e., the power to take evidence, issue subpoenas, compel the attendance and testimony of witnesses and the production of documents and other materials; and
- authorized to delegate these powers to those investigating the applications on behalf of the Minister.

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(43) *Ibid.*

(44) *Ibid.*

The Minister is given statutory criteria on which to base his or her decisions on such applications. To grant one of the remedies available to the applicant, the Minister has to be satisfied that there is a "reasonable basis to conclude that a miscarriage of justice likely occurred..." (clause 81, new section 696.3(3)). In making such a determination, the Minister has to be guided by the following considerations:

- whether the application was supported by new matters "of significance" not previously considered in the case;
- the relevance and reliability of information presented in connection with the application; and
- the fact that the ministerial review procedure is an extraordinary remedy and is not intended to serve as a further appeal (clause 81, new section 696.4).

These principles are consistent with those enunciated by the then Minister of Justice, Allan Rock, in his April 1994 reasons for decision in the section 690 application of W. Colin Thatcher.[45]

Although the foregoing criteria and considerations are not particularly precise, they do provide more guidance to the Minister (and also a greater basis for judicial review of the Minister's decision) than the current provisions. Although clause 81 (new section 696.3(4)) provides that the Minister's decision on an application is final and not subject to appeal, this language does not appear to preclude judicial review in such matters.

Finally, clause 81 (new section 696.5) requires the Minister of Justice to submit an annual report to Parliament on the handling of applications for ministerial review.

Consistent with the conclusions of a 1991 report of a federal-provincial-territorial working group on the issue, the government has rejected calls by some – including a provincial public inquiry[46] – to transfer the job of reviewing alleged miscarriages of justice to an independent commission, as has been done in the United Kingdom with the Criminal Cases Review Commission. Among other things, it is argued that the federal Minister of Justice does not have the same conflict-of-interest problem as did the UK Home Secretary (who formerly

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(45) See Department of Justice, "Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code," Consultation Paper, Ottawa, October 1998.

(46) *Royal Commission on the Donald Marshall, Jr., Prosecution*, Commissioners' Report, Halifax, December 1989, Vol. 1, pp. 143-146 (recommendations 1 and 2). Another provincial inquiry into a case of wrongful conviction recommended that the creation of such a body should at least be studied by the federal government: Hon. Fred Kaufman, *The Commission on Proceedings Involving Guy Paul Morin: Report*, Toronto, March 1998, Vol. 2, pp. 1237-1241 (recommendation 117).

dealt with such applications there) because, in Canada, the vast majority of criminal prosecutions are conducted by the provinces. Despite this, the Department of Justice has indicated that it intends to appoint a Special Advisor from outside the Department to oversee the review process;[47] however, there is nothing in clause 81 or in the bill which would commit the government to this course of action.

I. Amendments to the *Firearms Act* and Related Provisions in the *Criminal Code*

The changes to the firearms legislation are administrative in nature (there being no changes to the basic policy and goals of the legislation) and, in part, are intended to respond to concerns raised by gun owners. Here are three examples:

- it will be less complicated to obtain an authorization to transport most prohibited firearms than is currently the case;
- owners of restricted firearms and prohibited handguns will be allowed to change their purpose for possessing such firearms; and
- the class of grandfathered prohibited firearms and the class of grandfathered individuals allowed to possess them will be enlarged so that more people will be allowed to retain these firearms.

In addition, the bill makes it easier for Canadians to comply with the requirements of the *Firearms Act* by streamlining the administrative processes, for example, by allowing electronic applications and electronic issuances of documents.

The Bill also makes a series of administrative amendments (that are being made to allow for the better administration of the firearms legislation) such as:

- creating a position of Commissioner of Firearms to oversee the administration of the firearms program;
- making the Registrar, rather than the Chief Firearms Officer, responsible for certain transfers;
- extending the term of certain licences; and
- clarifying weapons that are exempt from the application of certain provisions of the legislation.

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(47) Department of Justice, Press Release, "Criminal Code Changes Will Strengthen Justice System," Ottawa, 8 June 2000.

1. *Criminal Code* Amendments

a. Administrative

Clause 4(1) adds the term "Commissioner of Firearms" to the definitions in Part III (Firearms and other Weapons) of the *Criminal Code*. This refers to the new position of Commissioner of Firearms that is to be created under section 81.1 of the *Firearms Act* and is discussed in more detail below.[48]

Clause 9 adds the Commissioner of Firearms, the Registrar and a person designated by the Registrar under section 100 of the *Firearms Act* as people who are "public officers" for the purposes of section 117.07 (exempted persons) of the *Criminal Code*.

b. Airguns

Clause 4(2) modifies section 84(3) of the *Criminal Code* which sets out regulated items that are excluded from requirements of the *Firearms Act*, and certain listed *Criminal Code* provisions in Part III.[49] Pursuant to current section 84(3)(d), a weapon is deemed not to be a firearm (for the above listed purposes) if it is not designed or adapted to discharge:

> (i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second; or
> (ii) a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second.

This exemption generally applies to many airguns and other similar types of weapons that are found in Canada. There has been concern lately with respect to lightweight pellets which can be discharged by certain airguns at a speed exceeding the maximum set out in the exemption. Some people were concerned that these airguns would no longer be exempt from the licensing and registration provisions. The goal of the amendment is to clarify the exemption by adding a muzzle energy standard to the existing muzzle velocity standard.

Under new section 84(3)(d)(i), a weapon not designed or adapted to discharge a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second or at a muzzle energy exceeding 5.7 Joules is deemed not to be a firearm (for the listed purposes).

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(48) See clause 136 of Bill C-15.

(49) For example, the licensing and registration offences do not apply to exempted items although it is an offence to use such an item in the commission of an offence.

The intention was to exempt a weapon if it satisfies one of the two standards. Thus, even if the weapon discharges lightweight pellets at a speed exceeding the maximum set out in the exemption, it may still be exempted if it does not exceed the new muzzle energy standard. There has been some debate regarding whether the new provision does what it intended. Some argue that both standards will have to be satisfied for the weapon to be exempt. Because of the use of a double negative, the section seems to contradict itself when it is turned into a positive. As written, it appears that the weapon only needs to satisfy one of the two standards to be exempted. The new muzzle energy standard is also added to section 84(3)(d)(ii).

c. Judicial Interim Release

Clause 7 modifies section 115 of the *Criminal Code* so that the forfeiture of everything the possession of which is prohibited by a prohibition order and that is in the possession of the person against whom the prohibition order is made does not apply for an order made under section 515 (Judicial Interim Release).

In addition, clause 8 modifies section 116 of the *Criminal Code* dealing with authorizations, licences and registration certificates that are revoked or amended pursuant to a prohibition order. In the case of an order under section 515 (Judicial Interim Release), the authorizations, licences and registration certificates are only revoked or amended for the period during which the order is in force.

The purpose of the amendments is to ensure that firearms will not automatically be forfeited to the Crown when a person is charged with an offence and an order is made under section 515. A clarification is also made with respect to firearms documents that are revoked or amended (when a person is charged with an offence) by an order made under section 515. This will allow a person to regain possession of his or her firearms if the person is not found guilty of an offence.

d. Technical amendments

Clause 5 clarifies section 85(1)(a) of the *Criminal Code* so that it refers only to the offence of kidnapping (section 279(1)) and not also to the offence of forcible confinement (section 279(2)).

Clause 6 clarifies section 109(1)(c) of the *Criminal Code* so that it refers to the appropriate offence provisions of the *Controlled Drugs and Substances Act*.

2. *Firearms Act* Amendments

a. Definitions

Clause 97 modifies the definition of "authorization to export" so that it includes a permit to export goods that is issued under the *Export and Import Permits Act* and that is deemed by regulations to be an authorization to export. In addition, the term "carrier" no longer refers to a person who carries on a transportation business that includes the transportation of ammunition. Finally, the term "Commissioner" is added to the definitions. This refers to the new position of Commissioner of Firearms that is to be created under section 81.1.(50)

b. Carriers

Pursuant to clause 97(3), decisions regarding the licensing of carriers will now be made exclusively by the Registrar. There will be only one set of carriers who will be allowed to do business intraprovincially and extraprovincially. Corresponding changes are made by clauses 101, 127 and 134.

c. Restricted Firearms Safety Course

Clause 99 provides that for a person to be eligible to possess a prohibited firearm, the person must satisfy the requirements of the restricted firearms safety course.

d. Employee licensing

Bill C-15 changes the licensing requirements for employees of businesses who deal with regulated items. The legislation currently states that, in order for the business to be eligible for a business licence, every employee who, in the course of duties of employment, handles or would handle firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition, must be the holder of a licence authorizing the acquisition of restricted firearms.(51)

Clause 100 sets out different licensing requirements depending on the items that the employee handles and the items that the business possesses. Under new section 9(3.2), a business is eligible for a licence authorizing the possession of prohibited weapons, restricted

(50) See clause 136 of Bill C-15.

(51) *Firearms Act*, S.C. 1995, c. 39, section 9(3).

weapons, prohibited devices or prohibited ammunition if every employee who handles these items in the course of duties of employment is eligible to hold a licence under sections 5 and 6 of the *Firearms Act*. The items mentioned do not include firearms. Thus, these employees (who do not deal with firearms) would continue to be screened to determine whether they posed a risk to public safety (they would have to pass the background checks) but they would not be required to take a firearms safety course.

Under new section 9(3), a business is eligible for a licence authorizing the possession of non-restricted firearms if every employee who handles such items in the course of duties of employment is the holder of a licence that authorized the acquisition of firearms that are neither prohibited nor restricted. These employees would be screened to determine if they posed a risk to public safety and they would also be required to complete and pass the Canadian Firearms Safety Course (or otherwise satisfy the safety course requirement pursuant to section 7(1) of the *Firearms Act*). Thus, employees of businesses that dealt only in non-restricted firearms (firearms that are neither restricted nor prohibited), no longer need to hold a licence authorizing the acquisition of restricted firearms and therefore would not be required to complete and pass an additional restricted firearms safety course. This is subject to new section 9(3.1).

Under new section 9(3.1), businesses wishing to be eligible for a licence authorizing the possession of restricted or prohibited firearms would continue to have to meet the requirements in the current legislation. Their employees who handle firearms in the course of their duties of employment would not only be screened to determine if they posed a risk to public safety but would also have to hold a licence authorizing the acquisition of restricted firearms, i.e., they would have to complete and pass both the basic and the restricted firearms safety courses. This requirement would apply to all employees of such a business who handled firearms, whether or not they were restricted or prohibited.

e. Grandfathering

Clause 102 deals with handguns that became prohibited on 1 December 1998 on the coming into force of legislation passed by Parliament in 1995 (i.e., 25- and 32-calibre handguns and handguns with a barrel equal to or shorter than 105 mm).

The current amnesty for individuals who acquired such a handgun after 14 February 1995 and before 1 December 1998 and businesses in possession of such handguns

has recently been extended to 30 June 2001. For individuals, different rules apply regarding what a person may do with these firearms depending on whether a registration certificate was issued for the handgun under the former legislation. For businesses, different rules apply regarding what they may do with these firearms depending on whether the handgun was acquired on or before 14 February 1995 or after this date.

The 14 February 1995 date was chosen because this was the date on which Bill C-68 received first reading in the House of Commons. Thus, the class of grandfathered individuals and the class of grandfathered handguns were set on that date. People were not able to grandfather themselves between the date the legislation was introduced and the date it came into force. They could, however, still legally acquire these firearms until they became prohibited. The prohibition of such firearms should not have come as a surprise because the government had announced its legislative intentions in a document released in November 1994 entitled *The Government's Action Plan on Firearms Control*.

In addition to the amnesty, the current legislation allows these prohibited handguns to be possessed by individuals in the grandfathered class (people who had registered or had applied to register one of these prohibited firearms by 14 February 1995).[52] This exemption applies only to prohibited handguns for which a registration certificate under the former legislation had been issued to or applied for by that or another individual who was in possession of the firearm on 14 February 1995. Thus, the existing legislation creates a class of grandfathered individuals who may possess such firearms and a class of grandfathered firearms that may be possessed; both the firearm and the individual in possession of it must be grandfathered to satisfy the requirements of the exemption.

Because the current grandfathering provisions apply only to prohibited handguns for which, on 14 February 1995, a registration certificate under the former legislation had been issued to or applied for, only firearms possessed by individuals on that date can be in the grandfathered class. Dealer inventories and firearms in the possession of other businesses or public agencies did not have registration certificates; such firearms were recorded with the former restricted weapons registration system but not registered. Thus, at present, firearms that were in dealer inventories are not grandfathered and cannot be sold to grandfathered individuals.

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(52) *Firearms Act*, section 12(6).

Clause 102 replaces section 12(6) of the *Firearms Act* with new sections (6) and (6.1). Although the firearm and the individual in possession of it must still both be grandfathered to satisfy the requirements of the exemption, new rules apply regarding the class of grandfathered individuals and grandfathered handguns.

Regarding class of individuals who are grandfathered, new section 12(6) provides that the grandfathering date is now 1 December 1998 rather than 14 February 1995. Thus, a person who acquired a firearm between the date the legislation was introduced and the date it came into force is now also grandfathered (if the individual had registered or had applied to register one of these prohibited firearms by 1 December 1998 and, after this date, was continuously the holder of a registration certificate for that kind of handgun).

In addition, pursuant to new section 12(6.1), the class of grandfathered handguns is widened by changing the grandfathering date to 1 December 1998 and by grandfathering the inventories of prohibited handguns held by businesses. The amendment allows dealers to retain these prohibited handguns and sell them to grandfathered individuals (see above).

As stated above, the grandfathered class is at present limited to prohibited handguns for which, on 14 February 1995, a registration certificate under the former legislation had been issued to, or applied for, by the individual now in possession or another individual. In addition to changing the grandfathering date, the amendment clarifies that for these firearms to be in the grandfathered class, a registration certificate would not only have to have been applied for but also subsequently issued.

f. Place where prohibited or restricted firearm may be possessed

Clause 103 modifies where a prohibited or restricted firearm may be possessed. Section 17 of the *Firearms Act* will now refer to the dwelling-house of the individual as recorded in the Canadian Firearms Registry rather than the dwelling-house as indicated on the registration certificate. This change is required because the registration certificate does not indicate a location.

g. Authorizations to transport

The *Firearms Act* and its regulations currently provide different rules regarding the transportation and usage of prohibited firearms and restricted firearms. For example, prohibited firearms can only be transported and used for the specific purposes set out in

section 18. In addition, the transportation of prohibited firearms is allowed under the *Special Authority to Possess Regulations* for limited purposes. Thus, with the exception of recently prohibited handguns, the transportation of prohibited firearms is fairly restrictive. In fact, a special permit is required under the regulations for prohibited firearms, with the exemption of recently prohibited handguns. Meanwhile, section 19 provides that restricted firearms may be transported between two specified places for any good and sufficient reason and then goes on to set out a non-exhaustive list of purposes.

Bill C-15 deletes section 18 and provides that rules regarding authorizations to transport will be the same for prohibited and restricted firearms, although special rules will continue to apply for automatic firearms.(53) This means that authorizations to transport will be available for most prohibited firearms for the same reasons as for restricted firearms. In addition, a new purpose is added to the list of non-exhaustive purposes for which a prohibited or restricted firearm may be transported. The new purpose is to provide instructions in the use of firearms as part of a restricted firearms safety course. A corresponding change is made to section 65(3).(54)

h. Transfers

Bill C-15 amends the process that must be followed in order to transfer a firearm. Clause 105 provides that while the transferee must still hold a licence authorizing the transferee to acquire and possess that kind of firearm and that the transferor must have no reason to believe that the transferee is not authorized to do so, the transferee is no longer required to produce to the transferor a firearms licence. In addition, with the exception of an individual transferring a restricted or prohibited firearm, the person is only required to inform the Registrar of the transfer rather than the current requirements of informing a chief firearms officer and obtaining his or her authorization for the transfer. The current requirements continue to apply in the case of an individual transferring a prohibited or restricted firearm. If the Registrar is informed of a proposed transfer but refuses to issue a registration certificate, he or she is to inform a chief firearms officer of that decision. Thus, the Registrar replaces the chief firearms officer in the process of approving a transfer of non-restricted firearms between individuals; additional checks

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(53) See clause 104.

(54) See clause 129.

that may have been conducted by the chief firearms officer at the time of a transfer of a non-restricted firearm will no longer be conducted. A chief firearms officer, however, can still revoke a person's licence at any time if he or she has reason to believe that the person poses a safety risk.

A similar change is made by clause 106 to the transfer of a prohibited weapon, prohibited device, ammunition or prohibited ammunition to a business. The business is no longer required to produce a licence to the transferor, and the transferor is no longer required to inform a chief firearms officer of the transfer and obtain his or her authorization.

Pursuant to clause 107, a person will be able to transfer a firearm and other regulated items to a municipality in addition to Her Majesty in right or Canada, a province or a police force. The person is required to follow the procedures set out in section 26 of the *Firearms Act*. Clause 111 makes a corresponding amendment to section 31(2) of the *Firearms Act*. Pursuant to clause 113, a person will also be able to lend a firearm and other regulated items to a municipality.

Pursuant to clause 112, in the case of mail-order transfer of firearms, the firearms will no longer have to be delivered by a person designated by a chief firearms officer.

i. Exportation and Importation

Bill C-15 makes several changes to the exportation and importation provisions of the *Firearms Act* (most of which are not yet in force). Pursuant to clause 114, in addition to the current requirements that are imposed on non-residents who do not have a licence and wish to import firearms, a non-resident who declares a firearm has to produce to a customs officer a report that he or she has applied for and obtained before the importation from the Registrar. In addition, the non-resident is required to provide the Registrar with prescribed information regarding himself or herself and the firearm. A non-resident declaring a firearm will not have to produce the report if he or she satisfies the customs officer that the person has previously declared the firearm to a customs officer, that the declaration was confirmed by a customs officer, and that the duration of the declaration as provided in subsection 36(1) of the *Firearms Act* has not expired. In the case of non-compliance with subsection 35(1) of the *Firearms Act*, the customs officer will be able to specify a reasonable time during which the non-resident may attempt to comply. The current legislation only provides that the non-resident has a reasonable time to comply to the requirements without allowing the customs officer to specify

what is a reasonable time. The requirement for the report will allow a non-resident to have the paperwork and investigations completed in advance and should reduce delays at the border.

Pursuant to section 36 of the *Firearms Act*, a confirmed declaration under section 35 has the same effect as a licence and a registration certificate. Clause 116 modifies section 36 of the *Firearms Act* to provide that the confirmed declaration has the same effect as a licence authorizing the non-resident to possess the kind of firearm being imported (rather than permitting the possession of only the firearm being imported). Thus, such a non-resident would be able to borrow a firearm of the same class while in Canada with a confirmed declaration. In addition, the confirmed declaration could be valid for up to one year (rather than the current 60 days). A new provision allows a chief firearms officer or the Registrar to declare that subsection 36(1) (temporary licence and registration certificate) ceases to apply for a particular non-resident or a particular firearm for any good and sufficient reason. This will generally happen when there is a safety concern.

Clause 115 adds new provisions dealing with importation by non-residents with a licence (in the case where a non-resident has obtained a licence in Canada). Although different conditions apply depending on whether a registration certificate has been issued for the firearm, the non-resident is always required to: declare the firearm to a customs officer in the prescribed manner; produce a licence; and, in the case of a restricted firearm, produce an authorization to transport. The provision also sets out what happens in the case of non-compliance. A confirmed declaration has the same effect as a registration certificate.

Clause 117 deals with the exportation of firearms. A non-resident may export a firearm that he or she has imported in accordance with section 35 or 35.1 of the *Firearms Act* (as discussed above) if the non-resident complies with the regulations relating to the exportation of firearms and holds, in the case of a restricted firearm, an authorization to transport. The provision sets out what happens in the case of non-compliance. The current legislation provides different rules depending on whether the non-resident has a licence.

Pursuant to modified section 38, an individual may export a firearm if he or she has the proper documentation for the firearm and complies with the regulations relating to the exportation of firearms. Once again, the provision sets out what happens in the case of non-compliance.

Clause 118 deals with the importation of firearms by an individual who holds a licence. There are different rules depending on whether the firearm was exported as discussed

above or whether this is a newly imported firearm for which there is no registration certificate. Clause 119 deals with the duties of the Registrar on being informed of a newly imported firearm (a firearm for which there is no registration certificate). The chief firearms officer was previously responsible for these duties. The Registrar must verify whether the individual holds a licence to acquire and possess that kind of firearm, verify the purpose for which the individual wishes to acquire a restricted firearm, decide whether to approve the importation, and take the prescribed measures. The provision also sets out the permitted purposes for acquiring a restricted firearm.

With regard to importation by businesses, clause 121 provides that where an authorization to import is not confirmed by a customs officer, a person has 90 days rather than the current 10 days to export the described goods before they are forfeited to the Crown.

In addition, with regard to exportation by businesses, clause 122 adds a new subsection to section 49 dealing with the exportation of goods authorized by permit issued under the *Export and Import Permits Act*. Such a permit may be deemed to be an authorization to export which means that an authorization to export under the *Firearms Act* would not be required.

Clause 123 modifies section 50 to limit what needs to be reported by a customs officer to the Registrar. In addition, section 51 is modified so that the Minister responsible for the *Export and Import Permits Act* will inform the Registrar of every application under that Act for a permit to export in relation to a firearm. This will allow the Registrar to know what is being exported.

Clauses 120 and 125 add new sections to the *Firearms Act* dealing with the report a non-resident must produce to a customs officer as discussed above. Under new section 42.1, the Registrar must inform the Canada Customs and Revenue Agency of the reports that he or she makes. In addition, new section 55.1 allows the Registrar to request further information from the applicant and to conduct investigations that he or she considers necessary.

j. Applications for and issuance of licences, registration certificates and authorizations

Clause 124 provides that applications for a licence, registration certificate or authorization must be made in the prescribed form, which may be in writing or electronic, or in the prescribed manner. In the current legislation, the application must be in the prescribed form, without specifying the type of form.

Clause 126 modifies section 61 to set out how licences and registration certificates must be issued. These documents must be issued in the prescribed form, which may be in writing or electronic, or in the prescribed manner and also include prescribed information, including any conditions. A similar change is made with regard to authorizations to carry, authorizations to transport, and authorizations to export or import. Currently, the legislation only specifies that the document must be in the prescribed form and include the prescribed information, including any conditions.

The purpose of these amendments is to allow greater flexibility in the application for, and the issuance of, firearms-related documents. It will allow the Canadian firearms program to use new avenues (such as electronic means) for applications for, and the issuance of, firearms-related documents.

k. Duration of licences and authorizations

Clause 128(1) provides that the duration of licences issued before 30 June 2001 may be extended by up to an additional four years. A chief firearms officer may do this until 1 January 2005. The purpose of this clause is to allow licences to expire in different years rather than most of the licences expiring at the same time. This should remove strain on the system.

In addition, pursuant to clause 128(2), business licences may now be issued for up to three years (rather than the current one year for most businesses). Also, a business that sells only ammunition may have a licence of a duration of up to five years. Bill C-15 also allows a chief firearms officer to stagger these licences by extending their term. The Chief Firearms Officer is required to give notice to the holder of a licence (either an individual or a business) of an extension.

The legislation currently provides different rules regarding the duration of authorizations to transport depending on whether the authorization took the form of a condition attached to a licence. This distinction is eliminated in Bill C-15 and the duration of the authorization is the period for which it is issued, to a maximum of five years (rather than the current three years), or the expiration of the licence, whichever is earlier.[55] This will allow authorizations to transport to expire at the same time as a firearms licence.

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(55) See clause 129.

l. Renewals

Clause 130 provides that a chief firearms officer may renew a licence, authorizations to carry, or authorization to transport in the prescribed manner (rather than in the same manner and in the same circumstances in which these documents may be issued). The purpose of this amendment is to allow for a streamlining of the renewal process. Because information will already be on file, it is believed that a simplified process is more appropriate at the time of renewal.

m. Purpose for possessing restricted firearms or grandfathered handguns

Pursuant to the current legislation, a chief firearms officer – on renewing a licence for restricted firearms or grandfathered handguns – must decide whether any of those firearms or handguns are being used for the purpose for which the individual acquired the restricted firearms or handguns or, in the case of restricted firearms or grandfathered handguns possessed on commencement day, the purpose specified by the individual in the application. Section 28 of the *Firearms Act* sets out the purposes for which these firearms may be possessed (i.e., to protect life or for use in connection with an occupation; for use in target practice or target shooting competition; or to form part of a gun collection). Clause 130 would allow a person to modify the purpose for which the firearm is being possessed as long as it is still an authorized purpose under section 28. Corresponding changes are being made by clauses 132 and 135.

n. Notices of refusal or revocation

Clause 133 deals with notices of refusal or revocation. It provides that a notice of refusal to issue a licence, authorization to transport, a registration certificate, authorization to export or to import, or the revocation of such a document is no longer needed if the holder has requested that the document be revoked or the revocation is incidental to the issuance of a new licence, registration certificate or authorization.

o. Commissioner of Firearms and Registrar

Clause 136 creates the new position of Commissioner of Firearms who is to be responsible for overseeing the firearms program. This person is to be appointed by the Governor in Council and may exercise the powers that are delegated by the federal Minister. The only

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powers that may not be delegated are the power to delegate as set out in the section creating the new position and the power to exempt individuals from the application of the firearms legislation as provided in section 97 of the *Firearms Act*. In the case of absence, incapacity or vacancy, the federal Minister may appoint someone to perform the duties of the Commissioner but no person may be so appointed for a term of more than 60 days without approval of the Governor in Council. The Commissioner is deemed to be a person employed in the Public Service for the purposes of the *Public Service Superannuation Act* and for the purposes of the *Government Employees Compensation Act*.

The position of Registrar is also to change. Under the current legislation, the Registrar is appointed by the Commissioner of the RCMP after consultation with the federal Minister and the Solicitor General. Under Bill C-15, the Registrar shall be appointed or deployed in accordance with the *Public Service Employment Act*. In addition, in the case of absence, incapacity or vacancy, the Commissioner of Firearms may perform the duties of the Registrar. A transitional provision provides that the current Registrar will remain in this position until another person is appointed or deployed.

Clause 138 provides that it is the Commissioner of Firearms (rather than the Registrar) who is required to report to the federal Minister; this report is to be laid in each House of Parliament. The former Registrar, who was appointed by the Commissioner of the RCMP, reported to the Solicitor General.

p. Exemptions

Section 97 of the *Firearms Act* currently allows a provincial minister to exempt, for any period not exceeding one year, employees of specified businesses from the application of the firearms legislation for anything done by them in the course of or for the purpose of their employment. Such exemptions are not permitted if there are public safety concerns, and the provincial minister may attach conditions to the exemption.

Bill C-15 adds new exemption powers to the *Firearms Act*. Pursuant to clause 139, the Governor in Council can exempt any class of non-residents from the applications of the *Firearms Act* and specified provisions of Part III of the *Criminal Code*. Such an exemption can be for any period. In addition, the federal Minister may exempt any non-resident for any period not exceeding one year. These exemptions are subject to public safety concerns, and conditions may be attached to the exemption. These new exemption powers are very broad

because there are no restrictions on the purposes for which these exemptions may be granted. The only limitation is the one related to public safety concerns. It appears that these exemptions may be used to exempt people on ships coming temporarily to Canada and to exempt U.S. police officers who must travel through Canada to get to their place of employment. These people would not otherwise be able to comply with Canadian legislation. For example, the law does not allow non-residents to import prohibited firearms which are used by the police.

q. Delegation to a firearms officer

Clause 140 modifies section 99 of the *Firearms Act* so that a firearms officer may perform any of the duties and functions of a chief firearms officer that are specified in his or her designation as a firearms officer. Under the current legislation, certain acts (such as the issuance of an authorization to carry and the issuance of a licence to a business authorizing the acquisition of prohibited firearms, prohibited weapons, prohibited devices or prohibited ammunition) can only be done by a chief firearms officer personally.

r. Regulation-making power

Clause 142 adds new elements to the regulation-making power that correspond to the changes being made in the legislation. For example, the Governor in Council is able to make regulations deeming permits to export goods or classes of permits to export goods (issued under the *Export and Import Permits Act*) to be authorizations to export for the purposes of the *Firearms Act*.

In addition, the Governor in Council will be able to make regulations dealing with other new matters, for example, those regarding:

- the importation or exportation of firearms and other regulated items;
- the marking of firearms manufactured in Canada or imported into Canada and the removal, alteration, obliteration and defacing of those markings; and
- the confirmation of declarations and authorizations to transport with respect to the importation of firearms.

s. Technical amendments

The Bill also makes a series of corresponding and technical changes.[56]

(56) See clauses 98, 108, 109, 110, 131, 141, 143 and 144.

J. *National Capital Act* Offences

Clause 145 would amend the *National Capital Act*, R.S.C. 1985, c. N-4, to effectively raise the maximum fine for violation of regulations made under that Act from $500 to $2,000.

K. Military Justice System (Identification of Criminals)

Clause 146 of the bill amends the *National Defence Act*, R.S.C. 1985, c. N-5, in order to provide for the taking of fingerprints, photographs and other authorized measurements from persons charged with or convicted of serious offences under the Code of Service Discipline. Clause 146 essentially adds provisions to that Act which are analogous to the *Identification of Criminals Act*, R.S.C. 1985, c. I-1, which applies to persons charged with or convicted of indictable offences under the *Criminal Code*.

COMMENTARY

A. Sexual Exploitation of Children and the Internet

Although the Internet child-luring provisions of Bill C-15 (clause 14) have won praise from some individuals involved in law enforcement and in searching for missing children,[57] the new offence of accessing child pornography (clause 11(3)) has drawn criticism from some criminal defence lawyers and civil libertarians; concerns have also been expressed in newspaper editorials.[58] The child-luring provisions and the provisions dealing with court-ordered deletion of child pornography on the Internet (clause 13) have met with approval from the Canadian Association of Internet Providers who, in particular, support the idea of

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(57) Tonda MacCharles, "Child porn viewers on Net may be charged," *Toronto Star*, 15 March 2001, p. A1; Tonda MacCharles, "Child porn targeted in new law; Will be offence to display on computer," *The Hamilton Spectator*, 15 March 2001, p. B3; and Paul Samyn, "Grits aim to tame Net; Ottawa's massive crime bill targets cyberstalkers, child porn on Web," *Winnipeg Free Press*, 15 March 2001, p. A1.

(58) MacCharles, "Child porn viewers on Net may be charged," *supra*, note 57; MacCharles, "Child porn targeted in new law," *supra*, note 57; Tim Naumetz, "New laws target Internet child porn: Criminal Code changes aim to curb rising cyber-sex trade," *The Calgary Herald*, 15 March 2001, p. A1; and "Too much for one bill," *The Gazette* (Montreal), 16 March 2001, p. B2.

judges deciding on which material should be deleted, rather than leaving it up to private Internet Service Providers.[59]

B. Cruelty to Animals

Opinion is divided with regard to the cruelty to animals provisions of Bill C-15.

The response of groups and individuals seeking increased protection for animals has been generally positive. For example, the provisions are supported by the Canadian Federation of Humane Societies.[60] In addition, Liz White of the Animal Alliance of Canada stated the following: "What this piece of legislation does is elevate the issue in the court's mind. It signals to judges that this is an issue that should be taken seriously. Whether it filters down to the courts depends largely on the people who take prosecutions to court. But it's an excellent first step."[61]

However, certain groups – including farmers and hunters – are troubled about certain of the new aspects of cruelty to animals' provisions. For example, they are concerned about removing the cruelty provisions from the property sections of the *Criminal Code* and creating a new Part for these provisions. David Borth, general manager of the B.C. Cattleman's Association, stated the following: "It's moving from property rights to almost human rights" and added that "we do have some concern about what this is indicating."[62] Other concerns raised deal with matters such as the broad definition of animal and the defences that are available.

When Bill C-17 was before the House of Commons, some people were concerned about the possible applications of the law. For example, hunters, trappers, farmers and bio-medical researchers feared criminal prosecution for certain acts (e.g., branding). Some of these groups had requested that the language in the legislation be clarified.[63] For example, they were

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(59) MacCharles, "Child porn viewers on Net may be charged," *supra*, note 57; MacCharles, "Child porn targeted in new law," *supra*, note 57; Samyn, "Grits aim to tame Net," *supra*, note 57; and Mark MacKinnon, "Web cleanup law targets child porn," *The Globe and Mail*, 15 March 2001, p. A1.

(60) Canadian Federation of Humane Societies, Press Release, "Animal Cruelty Bill Back on the Table," 15 March 2001. This document can be found at http://www.cfhs.ca/GeneralInfo/Media/media5.htm - March%2015,%202001

(61) "Animal Rights Activists Applaud Tougher Laws," *Ottawa Citizen*, 14 March 2001, p. A6.

(62) "Cruelty to Animals will bring Tougher Sentences and Heftier Fines," *Vancouver Sun*, 14 March 2001, p. A4.

(63) For an example of concerns that were raised about the application of this legislation, see "Animal Cruelty Law Opens Legal Can of Worms," *Ottawa Citizen*, 24 March 2000, p. A6.

concerned about the possible interpretation that might be given to the phrases causing "unnecessary pain, suffering or injury" and "brutally or viciously" killing an animal. Clearly, both Bill C-17 and C-15 were drafted to allow some causing of pain and suffering to animals by including the word "unnecessary." If the pain and suffering is necessary for some lawful purpose, it does not appear to be covered by the proposed provisions. It will be interesting to see if these same concerns will be raised with respect to Bill C-15.

It is possible that the concerns of these groups could be alleviated if the legislation set out, as exceptions, certain acts that would not be considered criminal. For example, the Law Reform Commission of Canada – in its report on recodifying criminal law – set out the following exceptions to its proposed cruelty to animals offence:

> 20(2) Exceptions: Necessary Measures. For the purpose of clause 20(1), no injury or serious physical pain is caused unnecessarily if it is a reasonably necessary means of achieving any of the following purposes:
>
> (a) identification, medical treatment, spaying or neutering;
> (b) provision of food or other animal products;
> (c) hunting, trapping, fishing, and other sporting activities conducted in accordance with the lawful rules relating to them;
> (d) pest, predator or disease control;
> (e) protection of persons or property;
> (f) scientific research unless the risk of injury or serious physical pain is disproportionate to the benefit expected from the research; and
> (g) disciplining or training of an animal.[64]

The addition of similar exceptions in the proposed legislation might limit the fears of those groups concerned with its application.

C. Disarming a Peace Officer

The new offence of disarming a peace officer should not raise much controversy. David Griffin, Executive Officer of the Canadian Police Association (CPA), the organization that initiated the process leading to the proposed offence, stated that the CPA is "very much in support of this provision."[65]

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(64) Law Reform Commission of Canada, Report 31, "Recodifying Criminal Law, 1987," p. 98.

(65) Telephone conversation with the author on 24 April 2001.

D. Criminal Procedure Reform

The Ontario-based Criminal Lawyers' Association (CLA) supports certain initiatives in the bill – such as facilitation of electronic filing of documents and remote court appearances, establishing a guilty plea inquiry procedure, and enabling Attorneys General more flexibility in intervening in private prosecutions – and does not take issue with the notion of requiring advance notice of expert testimony.(66) However, both the CLA and the Association in Defence of the Wrongfully Convicted (AIDWYC) oppose any new restrictions on the availability of preliminary inquiries.(67) These groups believe that, in addition to its principal function of screening out or reducing charges which the evidence does not support, the preliminary inquiry continues to perform a useful role in permitting the accused to obtain further information, assess the strength of witnesses, and generally test the strength of the prosecution's case before trial.(68) In fact, the CLA advocates enhancing the screening role of the preliminary inquiry by raising the standard for committing an accused for trial and enabling the inquiry judge to weigh evidence and exclude evidence which would not be admissible at trial.(69)

E. Wrongful Conviction Review

With regard to the proposed changes to the section 690 conviction review process, groups involved with the wrongfully convicted, such as the Association in Defence of the Wrongfully Convicted (AIDWYC), have been critical that they do not go far enough in establishing an independent review process. AIDWYC in particular has expressed its support for the British model of an independent commission taking over this function from the Minister of Justice and contends that the amendments proposed in the bill do not represent any substantial change from the existing process.(70)

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(66) Criminal Lawyers' Association, "Submissions on Behalf of the Criminal Lawyers' Association Regarding Criminal Procedural Reforms," paragraphs 1-6 (available on the CLA website at www.criminallawyers.ca).

(67) *Ibid.*, paragraphs 12-26.

(68) *Ibid.*, paragraphs 15-23.

(69) *Ibid.*, paragraph 26.

(70) Kaufman, Vol. 2, p. 1237; and Lynne Cohen, "Courage of Convictions," *Canadian Lawyer*, Vol. 24, No. 11 (November/December 2000), p. 47.

F. Firearms

Any changes to the firearms legislation are sure to create interest. Although some of the changes are administrative in nature and should not be highly controversial, other changes will be criticized.

Groups that originally supported Bill C-68 generally approve the changes that are being made. For example, according to Wendy Cukier, president of the Coalition for Gun Control:

> There are some minor concessions to firearms owners, which, for the most part seem to be aimed at reducing unintended consequences for dealers and owners of prohibited weapons and making it easier for restricted weapons owners to change the purposes for which they own their firearm. We do not strongly object to these concessions...[71]

Firearms groups, which are still steadfastly against the principles of Bill C-68, are concerned with many aspects of Bill C-15, particularly the drafting of the firearms provisions. For example, Jim Hinter, president of the National Firearms Association, stated that Bill C-15 was "another example of failure in drafting a bill."[72] One of the concerns is with respect to firearms that are exempted from the licensing and registration provisions. As stated above, Bill C-15 adds a new energy standard to the current velocity standard. The intention was that a barrelled weapon would only have to satisfy one of the two standards to be exempt (either fall below the specified energy or fall below the specified velocity). Firearms groups are concerned that the way the provision has been drafted, a barrelled weapon will have to satisfy both standards to be exempt. If this were true, many firearms that are currently exempt would become subject to licensing and registration. Much of the confusion comes from the use of a double negative in the provision. In addition, certain firearms groups have stated that the energy standard is too low and will not exempt firearms that were intended to be exempted.

Another concern is the frequent use of the term "as prescribed" in the firearms provisions of Bill C-15. Because many of the rules will be prescribed by regulations at a later date, there is no way of knowing precisely what they will be.

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(71) Coalition for Gun Control, Press Release, "Public Safety Groups support efforts to streamline firearms legislation," 15 March 2001.

(72) Telephone conversation with the author on 24 April 2001.